

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

TRACIE HUNTER, et al.,	:	Case No. 1:10-cv-820
	:	
Plaintiffs,	:	
	:	Chief Judge Susan J. Dlott
vs.	:	
	:	<u>MOTION OF PLAINTIFFS</u>
HAMILTON COUNTY BOARD OF	:	<u>HUNTER AND INTERVENOR-</u>
ELECTIONS, et al.	:	<u>PLAINTIFF NORTHEAST OHIO</u>
	:	<u>COALITION FOR THE</u>
Defendants.	:	<u>HOMELESS FOR AN ORDER TO</u>
	:	<u>SHOW CAUSE WHY BOARD OF</u>
	:	<u>ELECTIONS SHOULD NOT BE</u>
	:	<u>HELD IN CONTEMPT</u>
	:	

MOTION

Plaintiffs Hunter and NEOCH move this Court to issue a Show Cause Order and conduct a hearing where the members of the Defendant Hamilton County Board of Elections (“Board”) must explain why the Board should not be held in contempt for its failure to follow three parts of this Court’s Orders (Doc. 13 and Doc. 39). Given the imminent January 22, 2011 deadline for completely complying with this Court’s Orders, Plaintiffs request that the hearing be convened within 24 hours.

MEMORANDUM IN SUPPORT

In its January 12, 2011 Order (Doc. 39) which enforced its November 22, 2010 Order (Doc. 13), this Court ordered the Board to 1) count 149 ballots that were investigated and found to have been cast in the wrong precinct due to poll worker’s error in determining whether the street address was located inside the precinct; 2) count seven ballots that were investigated, found to have been cast in the wrong precinct due to poll worker error, and unanimously voted upon at the Board’s December 28, 2010 meeting

and 3) investigate all ballots subject to the NEOCH Consent Decree for poll worker error and count those ballots as required by that Consent Decree;<sup>1</sup> 4) count the nine ballots cast in the correct precinct. Doc. 39 p. 1.

At the Board's meeting on January 12, 2011, the Board chose not to comply with the Court's Orders but instead sought a legal opinion. Two days later, on January 14, 2011, the Board met again and once again failed to follow this Court's Orders.<sup>2</sup> The legal opinion from Hamilton County Prosecuting Joe Deters, a Republican, recommended that the Board appeal the Court's order. Ex. B.<sup>3</sup> The legal opinion failed to mention the Supremacy Clause to the U.S. Constitution. The two Republican board members voted to appeal this Court's January 14, 2011 order. The two Democratic board members voted not to appeal. Given the need for the board members to submit a written summary of their positions to the Secretary of State who then can decide to appeal or not, it is likely that no appeal and no stay will be sought in the Sixth Circuit until well after January 22, 2011. Until and unless a stay is issued this Court's Orders must be complied with before January 22 or the certification of John Williams will become final.

Plaintiffs now move for a motion to show cause why Defendants should not be held in contempt and request that a hearing be held within the next 24 hours. The Board is squandering the few precious days it has left to investigate the NEOCH ballots, count all the ballots that this Court has ordered to be counted, and conduct the recount, which involves at a minimum counting 3% of all ballots cast in the Hunter/Williams race by

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<sup>1</sup> On January 12, 2011 the Ohio Secretary of State reversed himself and also ordered the Board to investigate the NEOCH ballots. (Ex. A. Directive 2011-05). The Secretary of State stated "the board *should* examine those provisional ballots that are subject to the consent decree in [NEOCH], in accordance with the requirements of Directives 2010-74 and 2010-79 . . ." (Ex. A emphasis added).

<sup>2</sup> Transcript of the January 14, 2011 Board Meeting will be filed as soon as it is received.

<sup>3</sup> The Board waived privilege and released the opinion as a public record at the Meeting.

hand (approximately 7,000 ballots). All this work must be done by 11:59 p.m. on January 21, 2011. If it is not done—and if this Court does not stay the state deadline for final amendments to the canvass—then John Williams, the certified winner, can be sworn in as Hamilton County Juvenile Judge on January 22, 2011 at 12:01 a.m. solely because of the Board’s defiance of this Court’s Orders. Such an outcome would be a denial of equal protection, due process, and fundamental fairness to Tracie Hunter, to the provisional voters in this election whose votes were ordered to be counted, and to our system of justice, which requires that parties obey this Court’s orders.

**A. This Court Has the Authority to Hold the Board and its Members in Contempt**

A district court has authority to interpret its own orders and hold parties in contempt. District court contempt findings are reviewed for an abuse of discretion and reversed only if the factual findings supporting the contempt are clearly erroneous. *Satyam Computer Services, Ltd. v. Venture Global Engineering, LLC*, 323 Fed. Appx. 421, 430, 2009 WL 938494 \*8 (6th Cir. 2009). In a contempt proceeding the non-movant is entitled to notice, an impartial hearing, and an opportunity to present its case. *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 589 (6th Cir. 1987). The movant must produce clear and convincing evidence that the non-movant violated a definite and specific court order requiring it to perform or refrain from performing a particular act with knowledge of the court’s order. *Satyam Computer Services, Ltd.*, 323 Fed. Appx. at 433. Once movants establish their prima facie case, the burden shifts to the non-movant, who may defend by showing that it is presently unable to comply with the court’s order. *Id.*

Plaintiffs will establish their prima facie case. Plaintiffs will show that the Board knew of the Court's Orders, the Orders were definite and specific, and the Board failed to comply with the Orders. (Doc. 13 and Doc. 39).

The Board will not be able to meet its burden to show it is unable to comply with the court's order. The Board cannot rely on the defense of substantial compliance since it failed to take "all reasonable steps within [its] power to comply with the court's order." *Satyam Computer Services*, 323 Fed. Appx. at 430. Nor can the Board claim ambiguity as a defense because it is not ambiguous and in any event, the Board never sought a clarification of the court's order. *Id.* at 431, citing *Glover v. Johnson*, 934 F.2d 703, 708-709 (6th Cir. 1991) (holding that a defendant who failed to request a court to clarify, explain, or modify the language in its order was estopped from asserting an ambiguity defense).

**B. Plaintiffs have met their Burden of Showing the Board should be held in contempt of the Court's Orders**

At the Board's meeting on January 12, 2011, conducted after the Order was issued, the Board went into executive session to review the Order with its Counsel and then chose not to comply with the order but instead to seek a further legal opinion. Two days later, on January 14, 2011, the Board met again but took no steps to comply with this Court's Order.

- 1. The Board violated this Court's Order by Not Ordering Staff to Count seven ballots found to be cast in the wrong precinct due to admitted poll worker error, or to count 149 ballots found to have been cast in the wrong precinct due to poll worker error, or to Count the nine ballots voted in the correct precinct.**

The Board did not order the staff to count any of the ballots it was ordered to count and that violates this Court's Orders. The Board did not even take a vote on this issue.

It is clear that the Supremacy Clause of the U.S. Constitution requires that the Board follow the District Court's order. "State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution." *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 695, 99 S.Ct. 3055 (1979); *U.S. v. State of Michigan*, 712 F.2d 242 (6th Cir. 1983). In *Washington State Commercial Passenger Fishing Vessel Assoc.*, the U.S. Supreme Court held that it was absurd for the state to argue that the district court could not enforce its orders:

The federal court unquestionably has the power to enter the various orders that state official and private parties have chosen to ignore, and even to displace local enforcement of those orders if necessary to remedy the violations of federal law found by the court. [citations omitted] Even if those orders may have been erroneous in some respects, ***all parties have an unequivocal obligation to obey them while they remain in effect.***

*Id.* 442 U.S. at 696 (emphasis added). The Court sanctioned the use of "stern measures" to require respect for federal-court orders. *Id.*

The Seventh Circuit recently reached the same result. In *Madej v. Briley*, 307 F.3d 665 (7th Cir. 2004), the district court had ordered a new sentence in a criminal death sentence habeas case. After the governor commuted the death sentence to life in prison, the state sought to vacate the habeas writ as moot. When the district court denied the request, the state refused to comply with the district court's order. On a writ of mandamus, the Court of Appeals held that the state should have complied with the federal order. The court held that under the Supremacy Clause "[n]o state court can

*countermand an order, issued by a federal court, implementing the Constitution of the United States.”* *Id.* (emphasis added). The court chastised the prosecutor who chose to follow state law, not federal law and the federal court order:

Faced with conflicting orders—one issued by a federal court to implement the Constitution, and the other issued by a state court as a matter of state practice—the Attorney General of Illinois and the State's Attorney of Cook County preferred the latter over the former. This inverts the priority prescribed by the Constitution.

*Id.* at 667. The Court of Appeals issued a show cause order requiring the attorney who authored the legal briefs that ignored the Supremacy Clause to “show cause why we should not impose professional discipline.” *Id.* In light of this authority, there can be no doubt that the Supremacy Clause requires the Board to follow this Court’s Order, not the Ohio Supreme Court’s order, to the extent that they conflict.

The Board can not refuse to follow the Court’s Orders even if it has a belief that the order conflicts with the Ohio Supreme Court order. Such a position is not a defense to contempt. *Doe v. Briley*, 562 F.3d 777, 782 (6<sup>th</sup> Cir. 2009) (“[A] defendant to a contempt proceeding may not challenge the validity of the underlying injunction as a defense to violating that injunction.”). Therefore, the Board can offer no defense to a finding that it should be held in contempt.

**2. The Board violated the Order to Investigate and Count NEOCH ballots.**

The Board has not determined how many NEOCH ballots were rejected. On January 14, 2011 the Board refused to take any action to comply with this Court’s order to investigate the NEOCH ballots. Its inaction is also in conflict with Directive 2011-05, which requires the Board to follow Directives 2010-74 (Doc. 1-2) and 2010-79 (Ex. C).

**RELIEF REQUESTED**

Plaintiffs request this Court hold the Hamilton County Board of Elections in contempt of violating this Court's Preliminary Injunction (Doc. 13) and the Order Granting in Part and Denying in Part Plaintiff's Motion to Enforce the Preliminary Injunction (Doc. 39) and fine the Board \$10,000 for the first day of violation; \$20,000 for the second day of violation, \$30,000 a day for the third day of violation, plus \$5,000 per Board Member individually who does not act to comply with the Orders. For each additional 24 hour period thereafter, Plaintiffs request that the Board be fined an additional \$10,000 per day and each *noncompliant* Board member be fined an additional \$5,000 per day.

In addition, if the Board has not fully complied with this Court's Orders (Doc. 13 and 39) by 4:00 p.m. on January 21, 2011, Defendant Board should be enjoined from complying with the statutory deadline to amend the certification (see O.R.C. §§ 3505.32(A) and 3513.22) and Defendant Williams should be enjoined from being taking the oath of office for Hamilton County Juvenile Court Judge.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 14, 2011, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

/s/ Jennifer L. Branch